APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED JUNE 12, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 05-3601

JAY REIFERT,

Plaintiff-Appellant,

v.

SOUTH CENTRAL WISCONSIN MLS CORPORATION, REALTORS ASSOCIATION OF SOUTH CENTRAL WISCONSIN, INC., ROBERT L. COURTER, SUSAN MATTHEWS, DAVID STARK, ROBERT WEBER, THOMAS BUNBURY, MAURICE W. HILL, PETER SVEUM, MARSHALL ZWYGART, and DAVID MCGRATH,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin,
Case No. 04-C-0969-S—John C. Shabaz, *Judge*

ARGUED FEBRUARY 17, 2006—DECIDED June 12, 2006

Before FLAUM, *Chief Judge*, and KANNE and WOOD, Circuit Judges.

Appendix A

FLAUM, Chief Judge. Plaintiff-Appellant Jay Reifert claims that the defendants violated the Sherman Act by tying access to a real estate multi-listing service ("MLS") to membership in a Realtors Association. The district court granted summary judgment for all defendants in this case, finding no competition in the tied market and therefore, no antitrust violation.

For the following reasons, we now affirm the judgment of the district court.

I. Background

Realtors Association of South Central Wisconsin, Inc. ("RASCW") is a real estate trade association. Its members are real estate agents and appraisers in and around Madison, Wisconsin. RASCW offers a variety of products and services to its members, including lobbying, social functions, courses, referral programs, contract forms, conventions, publications, and legal information.

RASCW is associated with the Wisconsin Realtors Association and the National Association of Realtors ("NAR"). When a person pays membership dues to an association affiliated with NAR, that person becomes a member of NAR. Normally, Realtors Association[1] memberships are packaged as a group including local, state, and NAR memberships.

---

1. "Realtors Associations" are organizations affiliated with the National Association of Realtors and have agreed to abide by the NAR Code of Ethics. RASCW is an example of a local Realtors Association.

Appendix A

RASCW owns 100% of the stock in the South Central Wisconsin MLS Corp. ("SCWMLS"). The MLS or multiple listing service is a computerized database of homes and properties listed for sale by SCWMLS participants in south-central Wisconsin. Access to this multiple listing service is a necessity for real estate agents and appraisers in this area. Virtually all active residential real estate agents in the region subscribe to SCWMLS. Users are charged a quarterly fee to gain access to the full database and must be a member of a Realtors Association affiliated with NAR. The Realtors Association membership requirement has existed for more than fifty years. Generally, any licensed real estate professional who agrees to abide by the NAR Code of Ethics and pays the applicable fees is admitted.

Article 16 of NAR's Code of Ethics contains a "non-solicitation" rule. This article and the related standards of practice prohibit members from inducing sellers to breach listing contracts, advising sellers of superior services or prices during the time they are under contract with another Realtor, and using "information received through a Multiple Listing Service . . . to target clients of other Realtors®."

A member-elected board of directors sets dues for RASCW. Fees for SCWMLS are also set by members elected to a board of directors. Both organizations set their fees solely to cover operational costs, with no profit-making intent. Annual dues to join the NAR, Wisconsin Association of Realtors, and RASCW are approximately $449 a year.

The plaintiff, Jay Reifert, brings three claims against SCWMLS, RASCW, and the directors of SCWMLS. First, he alleges that SCWMLS unlawfully ties its services to

RASCW. Second, Reifert alleges that by conditioning access to MLS service on membership in RASCW, an unlawful group boycott has occurred. Finally, Reifert alleges that Article 16 of the NAR Code of Ethics violates the Section I of the Sherman Act, 15 U.S.C. § 1, by prohibiting competition.

Reifert, is a residential real estate broker, exclusively representing buyers of real estate in south central Wisconsin. Reifert has been a member of RASCW (or its predecessor) and a participant in SCWMLS (or its predecessor) since 1988. Reifert belongs to the National Association of Exclusive Buyer's Agents ("NAEBA") and has no desire to maintain membership in RASCW or the state and national Association of Realtors. Reifert objects to the fees he is forced to pay for unwanted services and the Code of Ethics he must follow to maintain his membership in RASCW and NAR.

Reifert claims that during the four years at issue in this action, he has paid dues in excess of $2000 for an unwanted RASCW membership to maintain his SCWMLS access. During the relevant four-year period, there have been approximately 2,079 annual and 5,600 total SCWMLS participants.

To support an antitrust action, a plaintiff must demonstrate that the defendant's actions have restrained competition. Section I of the Sherman Act states, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." 15 U.S.C. § 1. The Supreme Court has long recognized that Congress

intended to outlaw only "unreasonable restraints," not all contracts in restraint of trade. *See State Oil Co. v. Khan,* 522 U.S. 3, 10, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997) (citations omitted). The Clayton Act allows for private suits by individuals injured by violations of antitrust laws. *See* 15 U.S.C. §§ 15, 26.

On August 25, 2005, the district court granted summary judgment to the defendants and denied summary judgment to the plaintiff. A tying arrangement violates federal antitrust statutes if it has a substantial effect on interstate commerce. The district court found that "there is insufficient evidence for a fact finder to find that a tie between the defendant's multiple listing service and Realtor membership has had an effect on interstate commerce as that element has been defined by the Supreme Court."

As to Reifert's group boycott claim, the district court again found that the plaintiff had failed to prove any anticompetitive effects resulting from the tying of Realtors Association memberships to MLS services. Accordingly, the district court granted summary judgment to the defendants.

II. Discussion

We review a district court's grant of summary judgment de novo, taking all facts in the light most favorable to the non-moving party. *See, e.g., McCoy v. Harrison,* 341 F.3d 600, 604 (7th Cir.2003) (citations omitted). An award of summary judgment is proper when "there is no genuine issue as to any material fact and that the moving party is entitled

to a judgment as a matter of law." FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

A. Tying Claim

Reifert claims that the defendants have engaged in an unlawful tying arrangement by limiting SCWMLS access to members of a Relators Association. Thus, the alleged "tying product" is SCWMLS and the alleged "tied product" is membership in a Realtors Association.

In determining whether a violation of Section I of the Sherman Act, 15 U.S.C. § 1, has occurred as a result of a tie between two products or services, this Court requires the plaintiff to prove four elements. *See Carl Sandburg Vill. Condo. Ass'n No. 1 v. First Condo. Dev. Co.,* 758 F.2d 203, 208 (7th Cir.1985) (citing imposition of the "economic interest requirement . . . by courts in the Second, Third, Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits").

> In order to establish the per se illegality of a tying arrangement, a plaintiff must show that: (1) the tying arrangement is between two distinct products or services, (2) the defendant has sufficient economic power in the tying market to appreciably restrain free competition in the market for the tied product, and (3) a not insubstantial amount of interstate commerce is affected. [*N. Pac. Ry. Co. v. United States,* 356 U.S. 1, 5-6, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958)]; *Moore v. Jas. H. Matthews & Co.,* 550 F.2d 1207, 1212 (9th

> Cir.1977). In addition, this circuit has held that an illegal tying arrangement will not be found where the alleged tying company has absolutely no economic interest in the sales of the tied seller, whose products are favored by the tie-in. *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 835 (7th Cir.1978), *cert. denied*, 440 U.S. 930, 99 S.Ct. 1267, 59 L.Ed.2d 486 (1979); *Warner Mgmt. Consultants, Inc. v. Data Gen. Corp.*, 545 F.Supp. 956, 967 (N.D.Ill.1982).

Id. at 207-08.

Following this precedent, the district court correctly required Reifert to prove the following four elements of a tying violation: (1) a tie exists between two separate products; (2) the tying seller (SCWMLS) has sufficient economic power in the tying product market to restrain free competition in the tied product market (Realtors Association memberships); (3) the tie affects a not-insubstantial amount of interstate commerce in the tied product (Realtors Association memberships); and (4) the tying seller (SCWMLS) has some economic interest in the sales of the tied product (Realtors Association memberships). *Id.* at 207.[2]

---

2. We agree with our concurring colleague that a cautious approach is always appropriate when anticipating future Supreme Court actions. In 1985, our Circuit began to incorporate the rule of reason in our tying analysis. At that time, we stated that, "According to the Supreme Court, a plaintiff's failure to state a *per se* illegal antitrust claim does not necessarily prove fatal to his case if he can state a claim under the rule of reason." *Carl Sandburg Vill. Condo.*

(Cont'd)

Appendix A

There is no question that Reifert has satisfied the requirements for the first two elements. First, access to the multi-listing service cannot be obtained without purchasing the tied product, a Realtors Association membership. Second, SCWMLS has sufficient market power to restrain free competition in the tied product market.

SCWMLS is a unique product. Nearly every available home in the relevant geographic area is listed on the service. The near-perfect market information created by SCWMLS is the result of a requirement that members place all listings in the MLS within five days. The MLS allows individuals with access to search and filter properties based upon detailed

---

(Cont'd)

Ass'n No. 1, 758 F.2d 203, 210 (7th Cir.1985) (citing *Fortner Enter., Inc. v. United States Steel Corp.*, 394 U.S. 495, 499-500, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969); *Warner Mgmt. Consultants, Inc. v. Data Gen. Corp.*, 545 F.Supp. 956, 966 (N.D.Ill.1982)); *see also Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 35, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984) (O'Connor, J., concurring) ("The time has therefore come to abandon the ' *per se* ' label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have."). In a related area, the Supreme Court recently adopted Justice O'Connor's reasoning in *Jefferson Parish Hosp. Dist. No. 2* and held that tying arrangements involving patents should be evaluated based upon their market power "rather than under the per se rule." *Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, __ U.S. __, 126 S.Ct. 1281, 164 L.Ed.2d 26 (2006). Although the *per se* analysis of the *Jefferson Parish Hosp. Dist. No. 2* majority has not been expressly overruled, in the intervening twenty-one years since *Carl Sandburg Vill. Condo. Ass'n No. 1*, the Supreme Court has not found occasion to disagree with this Circuit's approach.

criteria including compensation offered to buyers' agents, detailed property information, neighborhood information, prior sales history, offers made on the property, days on the market, and the sale price of comparable homes. The features and information available through SCWMLS are not available through any other service. In addition, the MLS service targets a different audience-real estate agents and appraisers-than free listing services or newspapers. In short, it is impossible to perform the tasks of a real estate agent or appraiser in the relevant geographic area without using SCWMLS. Thus, it possesses sufficient market power to restrain competition.

The third element of the *Sandburg* test states that a tying arrangement violates antitrust law only if "a substantial volume of commerce is foreclosed" because of the tie. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde,* 466 U.S. 2, 16, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984). This element can be broken into two sub-questions: (1) Is there at least one competitor in the tied product market other than the favored seller; and (2) Is the quantity of interstate commerce affected not-insubstantial?

The district court found no competition in the allegedly tied market for Realtors Association memberships. Where there is no competition in the tied market, there can be no antitrust violation. Forcing a buyer to purchase a product he otherwise would not have purchased is insufficient to establish the foreclosure of competition. *Id.* ("[W]hen a purchaser is 'forced' to buy a product he would not have otherwise bought even from another seller in the tied product market, there can be no adverse impact on competition

because no portion of the market which would otherwise have been available to other sellers has been foreclosed.").

Despite Reifert's desire to avoid purchasing a Realtors Association membership, without evidence of competitors in the market for services offered by the Realtors Association, there can be no foreclosure of competition. *See Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 835 (7th Cir.1978); 9 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1723a (2d ed. 2004) ("When there are no rival sellers of the tied product to be foreclosed, then the alleged tie-in might affect a substantial volume of commerce in the tied product and yet not foreclose anyone."). The district court correctly found that despite the "laundry list of entities" submitted by the plaintiff, there were no competitors in the tied product market.

Products and services are in the same market when they are good substitutes for one another. "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962).

This Court requires that a plaintiff prove that products are good substitutes using economic evidence; a conclusory assumption of competition where products or services appear to be similar is insufficient. *See Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 664 (7th Cir.2004). Actual data and a reasonable analysis are necessary to demonstrate that a product or service is a good substitute for another.

Appendix A

"Economics, like the other social sciences, has its share of counterintuitive findings, so observing things that to the untutored eye seem to be substitutes need not mean that they *are* good substitutes." *Id.*

Other federal courts have held that conditioning access to a multi-listing service on membership in a Realtors Association is not indicative of an unlawful tying arrangement. *See Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors,* 850 F.2d 803 (1st Cir.1988); *O'Riordan v. Long Island Bd. of Realtors, Inc.,* 707 F.Supp. 111 (E.D.N.Y.1988); *Buyer's Corner Realty, Inc. v. No. Ky. Ass'n of Realtors,* 410 F.Supp.2d 574 (E.D.Ky.2006). One federal court has held that a tied real estate association group faced competition and therefore created an unlawful tie; as explained below, however, we find that case distinguishable. *See Thompson v. Metro. Multi-List, Inc.,* 934 F.2d 1566 (11th Cir.1991).

Reifert argues that by comparing participation in Realtors Associations in areas where MLS services are "open" to individuals who have not joined a Realtors Association with so called "closed" areas that require membership in a Realtors Association, he can demonstrate that agents have been forced to purchase Realtors Association memberships. This comparison is unreliable, however, because it fails to speak to the central question of whether a competitor exists in this particular "closed" market and does not account for other possible explanations for the observed differences. Forcing individuals in Reifert's position to purchase a product they do not want is not a violation of antitrust law. *See Jefferson Parish Hosp. Dist. No. 2,* 466 U.S. at 16, 104 S.Ct. 1551.

Appendix A

Even without an economic analysis, it is apparent that RASCW lacks competition. Each of the twelve organizations cited by Reifert fails to qualify as a competitor to the national or local Realtors Association:

1. Appraisal Institute (AI)covers only appraisers

2. Asian Real Estate Agent Association (AREAA)-serves a distinct ethnic community

3. Chinese American Real Estate Professionals Association (CAREPA)-serves a distinct ethnic community

4. Chinese Real Estate Association of America (CREAA)-serves a distinct ethnic community

5. Colorado Association of Exclusive Buyer Agents (CAEBA)-covers only exclusive buyer agents

6. Massachusetts Association of Buyer Agents (MABA)-covers only exclusive buyer agents

7. National Association of Exclusive Buyer Agents (NAEBA)-covers only exclusive buyer agents

8. National Association of Independent Fee Appraisers (NAIFA)-covers only appraisers

9. National Association of Hispanic Real Estate Professionals (NAHREP)-serves a distinct ethnic community

Appendix A

10. National Association of Independent Real Estate Brokers (NAIREB)-serves only independent brokers

11. National Association of Real Estate Appraisers (NAREA)-covers only appraisers

12. National Association of Real Estate Brokers (NAREB)-primarily devoted to the needs of minority brokers

The district court relied heavily upon the First Circuit's decision in *Wells Real Estate*. We believe that decision effectively captured the central flaw in Reifert's argument.

> [The plaintiff] has failed to demonstrate the slightest market for membership in real estate boards that might have been affected by the defendants' alleged tying arrangement. There is no evidence that any other broker would have "purchased" membership in any other board but for the power exerted by the lure of the defendants' MLS. There is no evidence that a substantial volume of "commerce" in board membership was foreclosed by the tie-in. The tying claim must fail absent any proof of anti-competitive effects in the market for the tied product.

Wells Real Estate, Inc., 850 F.2d at 815 (footnotes omitted).

While the organizations the plaintiff named may provide important services, they simply do not compete with RASCW or any other Realtors Association. These niche associations lack cross-price elasticity with the national and local Realtors

Associations, and have dissimilar purposes. These organizations are unlikely substitutes for a Realtors Association in Wisconsin.

Instead of providing the district court with the required economic analysis, Reifert employs a 30-year old decision from this Court, *Beatrice Foods Co. v. FTC,* 540 F.2d 303, 308 (7th Cir.1976), to frame his discussion of competition. *Beatrice Foods Co.* relied upon the Supreme Court's decision in *Brown Shoe Co.,* 370 U.S. at 325, 82 S.Ct. 1502, and set forth several "practical indicia" to determine a market's boundaries. "These indicia are (1) the industry or public recognition of the submarket as a separate economic entity, (2) the product's peculiar characteristics and uses, (3) unique production facilities, (4) distinct customers, (5) distinct prices, (6) sensitivity to price changes, and (7) specialized vendors." *Beatrice Foods Co.,* 540 F.2d at 308. While the "practical indicia" named in *Brown Shoe* and *Beatrice Foods Co.* are important considerations in defining a market, they were never intended to exclude economic analysis altogether. Both opinions recognized the importance of economic analysis, including cross-price elasticity of demand. *See Brown Shoe,* 370 U.S. at 325, 82 S.Ct. 1502 ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."); *see also Beatrice Foods Co.,* 540 F.2d at 308.

This Court has emphasized the use of economic analysis in the law. To demonstrate competition in an antitrust case, the plaintiff must provide an economic analysis of the relevant market. *See, e.g., Menasha,* 354 F.3d 661 (requiring

economic evidence to prove the existence of a distinct market). Lacking any economic evidence, Reifert has failed to show that the tying arrangement has foreclosed any portion of the market for real estate services.

The facts of the instant case stand in contrast to the situation analyzed by the Eleventh Circuit in *Thompson.* The defendants in *Thompson* operated an MLS system and tied MLS access to membership in a Realtors Association. The Plaintiff, Empire Real Estate Board, was "founded in 1939 as an African American professional association because, at that time, the Realtors [Association] excluded African Americans from membership." *Thompson,* 934 F.2d at 1570. The plaintiffs proved that as a result of the tie and the prohibitive cost of joining two groups, 400 brokers either did not join or quit the Empire Real Estate Board. *Thompson* held that where a competitor offering similar services loses four hundred members because of a tie between an association of real estate agents and an MLS service, there has been a substantial effect on interstate commerce. *Id.* at 1578. In our case, however, the plaintiff has not presented an organization equivalent to Empire Real Estate Board. *Thompson* presented a valid competitor; neither *Wells* nor the instant case does. Thus, *Thompson* demonstrated a substantial effect on interstate commerce, while Reifert has not.

Having found no competitors, there are many issues raised in the parties' briefs that we need not reach. We need not decide whether the quantity of interstate commerce affected is "not-insubstantial," nor must we address whether

SCWMLS has a sufficient economic interest in the sales of the tied product to satisfy the fourth element of an unlawful tying arrangement.

B. Group Boycott Claim

Reifert also asks this Court to consider the district court's grant of summary judgment to the defendants on his group boycott claim. A group boycott traditionally occurs when a particular group or individual is prohibited from joining an organization. "Where there are no exclusionary conditions attached to Realtor board membership, and there is no contention that the cost is prohibitively high, it is difficult to see any affront to competition." *Pomanowski v. Monmouth County Bd. of Realtors,* 89 N.J. 306, 446 A.2d 83, 92 (N.J.1982). In the instant case, no licensed real estate agent was denied access to SCWMLS because of an anti-competitive measure.

To prove a group boycott, a plaintiff must establish that the membership requirement has had an adverse impact upon competition in the market for the tied product. As stated above, Reifert has failed to demonstrate the existence of a competitive market for Realtors Association memberships. Thus, there is no need to balance the pro-competitive effects of the Realtors Association membership requirement against its anti-competitive effects. *See Buyer's Corner Realty, Inc.,* 410 F.Supp.2d at 583-84 (citing *O'Riordan,* 707 F.Supp. at 116).

C. Anti-Competitive Effects of the Code of Ethics

Reifert claims that Article 16 of the Code of Ethics of the National Association of Realtors is anti-competitive and violates Section I of the Sherman Act, 15 U.S.C. § 1. Article 16 prohibits members of the National Association of Realtors from interfering with the exclusive agreements other members have established with clients.

Reifert's allegations concerning the anti-competitive effects of Article 16, however, are overly broad. As the National Association of Realtors, Code of Ethics Standard of Practice 16-2 states, "Article 16 does not preclude Realtors® from making general announcements to prospects describing their services[.]" Rather, the Article's purpose is to prevent the targeted solicitation of individuals who have exclusively listed their property with another agent and to prevent agents from improperly using multiple listing services as a data bank of potential customers.

We must review a challenge to Article 16 under the rule of reason to determine whether the agreement contributes to competition and productivity. *See Nat'l Soc'y of Prof'l Eng'rs v. United States,* 435 U.S. 679, 695, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978). Under the rule of reason, Reifert had the burden to demonstrate that Article 16's net effect was anti-competitive. *See Bi-Rite Oil Co. v. Ind. Farm Bureau Co-op. Ass'n, Inc.,* 908 F.2d 200, 203 (7th Cir.1990).

The balance between pro- and anti-competitive effects weighs heavily in favor of Article 16. Even in "open" MLS areas such as Massachusetts and Alaska, where individuals

who have not joined a Realtors Association may access an MLS service, users must agree not to solicit the exclusive listings of other MLS users during the term of the listing. If agents were reluctant to post their listings, for fear that other agents would steal their clients, the market would become less transparent and less efficient. Article 16 aids competition and fulfills the purposes of the Sherman Act by providing a more transparent marketplace.

III. Conclusion

For the foregoing reasons, the judgment of the district court is AFFIRMED.

WOOD, *Circuit Judge*, concurring in the judgment. Although I agree without reservation with the majority's conclusion that the district court correctly granted summary judgment for the defendants in this case, I am concerned that some aspects of its opinion are in tension with the governing Supreme Court doctrine on tying arrangements. For the reasons I explain briefly here, I would take a more cautious approach, and leave further developments in tying law to the high court.

In *Northern Pacific Ry. Co. v. United States,* 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958), the Supreme Court defined a tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Id.* at 5-6, 78 S.Ct. 514. As the Court later made clear in *Jefferson Parish Hospital Dist. No. 2 v. Hyde,* 466 U.S. 2,

104 S.Ct. 1551, 80 L.Ed.2d 2 (1984), however, "every refusal to sell two products separately can not be said to restrain competition." *Id.* at 11, 104 S.Ct. 1551. The trick is to distinguish between tying arrangements that are invalid and those that are innocuous, from a competitive standpoint. In *Jefferson Parish,* the Court explained the difference as follows:

> Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.

Id. at 12, 104 S.Ct. 1551. Going on, over the objection of Justice O'Connor (who concurred in the judgment because of this point), the majority had this to say about the analytical approach toward tying arrangements:

> *Per se* condemnation-condemnation without inquiry into actual market conditions-is only appropriate if the existence of forcing is probable. Thus, application of the *per se* rule focuses on the probability of anticompetitive consequences.

Id. at 15-16, 104 S.Ct. 1551. The Court went on to describe the circumstances under which that probability would exist:

first, there must be a substantial potential for impact on competition, which would be shown if a substantial volume of commerce is foreclosed by the arrangement; second, anticompetitive forcing must be likely, which is the case when it is probable that the seller has market power. *Id.* at 16-17, 104 S.Ct. 1551. If the seller does not have "either the degree or the kind of market power that enables him to force customers to purchase a second, unwanted product in order to obtain the tying product," then the *per se* rule cannot be used and the arrangement must be assessed under a full rule of reason. *Id.* at 18, 104 S.Ct. 1551.

Despite Justice O'Connor's forceful opinion concurring in the judgment, in which she argued that the time had come to jettison the *per se* rule in tying cases, see *id.* at 35, 104 S.Ct. 1551, and despite the opportunity it had as recently as March 2006 to take that step, see *Illinois Tool Works Inc. v. Independent Ink, Inc.*, __ U.S. __, 126 S.Ct. 1281, 164 L.Ed.2d 26 (2006), the Court has refused to do so. *Illinois Tool Works* held only that the fact that a tying product is patented does not support a presumption that the seller has market power over that product. *See* 126 S.Ct. at 1291. It concluded that "tying arrangements involving patented products should be evaluated under the standards applied in cases like *Fortner II* and *Jefferson Parish* rather than under the *per se* rule applied in *Morton Salt* and *Loew's,*" both cases involving intellectual property (patents in *Morton Salt,* copyrights in *Loew's*). In my view, *Illinois Tool Works* thus stands only for the proposition that a plaintiff must prove that a holder of intellectual property has "either the degree or the kind of market power that enables him to force customers" to purchase the tied product. If a plaintiff can do

so, then the framework established by *Jefferson Parish* continues to apply.

In the case before us, we must decide whether Reifert has produced enough evidence to survive summary judgment with respect to the allegation that the defendant Realtors Associations have tied the multi-listing service (MLS, the tying product) to membership in the Realtors Association of South Central Wisconsin, Inc. (RASCW, the tied product). The district court concluded that Reifert had not come forward with the requisite evidence. I agree. The D.C. Circuit offered a useful summary of the elements of a tying case in *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C.Cir.2001):

> There are four elements to a *per se* tying violation: (1) the tying and tied goods are two separate products; (2) the defendant has market power in the tying product market; (3) the defendant affords consumers no choice but to purchase the tied product from it; and (4) the tying arrangement forecloses a substantial volume of commerce.

Id. at 85. Here, I am willing to say that Reifert has brought forth enough evidence to permit a trier of fact to rule in his favor on the first three of those elements. His proof fails, however, on the fourth.

The key point is not the measurement of how much commerce in the tied product market was affected. It is the fact that Reifert offered no evidence to show that there was any foreclosure in the tied product market. As far as we can

tell from this record, no one refrained from joining any other organization because of the cost of membership in the Realtor Associations (RASCW and the others) before us. This is what distinguishes our case from the Eleventh Circuit's opinion in *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566 (11th Cir.1991). In that case, the court explicitly rested its decision on foreclosure, to which it referred as the "coercion element," explaining that "plaintiffs need to show that [defendant] Metro not only has [ ] market power but also has wielded this market power to force brokers to alter their choice of professional associations." *Id.* at 1577. It then reported that the evidence in the record showed "that 400 of Empire's prospective and current members did not join Empire or quit Empire because of the prohibitive cost." *Id.* at 1578. This is precisely the type of showing that Reifert failed to make.

Analytically, the majority may well be right that the rule of reason approach it sees in *Carl Sandburg Vill. Condo. Ass'n No. 1 v. First Condo. Dev. Co.*, 758 F.2d 203 (7th Cir.1985), would be a more sensible way to approach all tying cases. But it is not for this court to anticipate the Supreme Court's overruling of its earlier decisions, even if the passage of time and the impact of later cases that create doctrinal tensions are evident to all. Just as we did in *Khan v. State Oil Co.*, 93 F.3d 1358 (7th Cir.1996), overruled by *State Oil Co. v. Khan*, 522 U.S. 3, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997), we should limit ourselves to pointing out the problems we see and then attempting to apply the law as it stands as best we can. In the present case, unlike *State Oil*, faithful application of the existing law leads to the same outcome as the more ambitious approach the majority has

chosen. For that reason, I am happy to concur in the outcome that the majority reaches, but I must respectfully decline to join its opinion.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN DATED AUGUST 25, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

04-C-969-S

JAY REIFERT,

Plaintiff,

v.

SOUTH CENTRAL WISCONSIN MLS CORPORATION, REALTORS ASSOCIATION OF SOUTH CENTRAL WISCONSIN, INC., ROBERT L. COURTER, SUSAN MATHEWS, DAVID STARK, ROBERT WEBER, THOMAS BUNBURY, MAURICE W. HILL, PETER SVEUM, MARSHALL ZWYGART and DAVID MCGRATH,

Defendants.

MEMORANDUM AND ORDER

Plaintiff Jay Reifert commenced this anti-trust action alleging that defendant South Central Wisconsin MLS Corp. ("SCWMLS") unlawfully ties the sale of its services to the purchase of services from its corporate parent, defendant Realtors Association of South Central Wisconsin, Inc. ("Realtors"). Plaintiff also alleges that conditioning access to MLS services on membership in Realtors is an unlawful

group boycott. Plaintiff named as defendants the individual directors of SCWMLS (collectively, "individual defendants"). Jurisdiction is based on 28 U.S.C. § 1331. The matter is presently before the Court on cross motions for summary judgment. The following is a summary of relevant undisputed facts.

FACTS

Defendant Realtors is a real estate professionals trade association and the owner of 100% of SCWMLS' stock. It offers services to its members including arbitration and mediation, enforcement of a code of ethics, education courses, professional recognition, referral programs, contract forms, legal information, conventions, publications, lobbying, website, and social functions. As a condition of membership Realtors requires members to join the Wisconsin Association of Realtors ("WAR") and the National Association of Realtors ("NAR"). NAR offers additional services including use of the "Realtors" trademark, an annual conference, a magazine and membership discounts. Defendant Realtors generally accepts as a member any licensed real estate professional who agrees to abide by the NAR code of ethics and pays the fees.

In 2005, annual fees to join all three associations are $441. Realtor dues are established by members who are elected to the board of directors. Dues are set solely to cover anticipated cost of operations and there is no attempt to make a profit. On March 18, 2005 RASCW had 2419 members, including 2306 real estate licensees and 113 appraisers.

Appendix B

Defendant SCWMLS operates a multiple listing service which includes a computerized data base of homes and properties for sale in south cental Wisconsin. To participate in the multiple listing service members must pay $90 per quarter. Fees are set by members elected to the board of directors. Fees are set solely to cover anticipated cost of operations and there is no attempt to make a profit. Licensed real estate brokers who are members of any local association of Realtors may participate in the SCWMLS multiple listing service. A high percentage of broker represented residential property sold in south central Wisconsin is listed in defendant's MLS. On March 18, 2005 only 84 of the 2306 real estate professionals who were Realtor members did not use SCWMLS. On March 18, 2005 SCWMLS gave access to 331 members of local Realtor associations other than defendant Realtors. SCWMLS operates the only multiple listing service primarily within Dane, Sauk and Columbia Counties.

Plaintiff is a licensed real estate broker in south central Wisconsin and the principal of Excel Exclusive Buyer Agency since 1997. He has been a member of Realtors and a participant in SCWMLS since 1988. He wants to continue his participation in SCWMLS but does not want to continue his membership in Realtors. He has continued his membership in Realtors solely to gain access to the multiple listing service.

According to a survey by plaintiff's expert Riddle, between 19 and 24% of Dane county SCWMLS users would not join Realtors if they were not required to join to gain access to the multiple listing service. In Massachusetts and

Appendix B

Alaska where multiple listing service access does not require membership in a local Realtors association more than 20% of MLS users do not belong to a Realtors association.

The National Association of Exclusive Buyer Agents ("NAEBA"), Colorado Exclusive Buyer Agents Association ("CEBAA"), and Massachusetts Association of Buyers Agents ("MABA") are associations of real estate professionals who are exclusive buyer agents. Plaintiff is a member of NAEBA, which offers services specific to representations of buyers. He knows of only one other exclusive buyer agent in Wisconsin eligible to join. CEBAA and MABA offer membership in Colorado and Massachusetts, respectively.

The Appraisal Institute ("AI"), National Association of Independent Fee Appraisers ("NAIFA"), and National Association of Real Estate Appraisers ("NAREA") are associations of professional real estate appraisers. They offer certifications, professional standards, education, appraisal databases, software, insurance, legislative monitoring, membership directories, conferences and commercial discounts. Annual membership fees for AI are $740. AI Membership requires payment of local chapter dues which are $110 in Wisconsin. NAIFA dues are $400 per year. NAREA dues are $215 per year.

The Asian Real Estate Agent Association ("AREAA"), Chinese Real Estate Association of America ("CREAA"), Chinese American Real Estate Professional Association ("CAREPA") and the National Association of Hispanic Real Estate Professionals ("NAHREP") are associations of real

estate professionals which promote the advancement and interests of ethnic communities. They offer networking, education, websites, lobbying, information resources and community service events. CREAA and CAREPA are headquartered and hold meetings in California. CAREPA is supported by the California Association of Realtors and NAR. Annual dues for these organizations are as follows: AREAA $100, CREAA $30, CAREPA $100, NAHREP $99.

The National Association of Independent Real Estate Brokers ("NAIREB") is open exclusively to brokers who are not affiliated with a franchised real estate company. NAIREB offers referrals, education networking and a magazine. It encourages members to join Realtor associations. NAIREB annual dues are $79.

MEMORANDUM

A *per se* tying violation requires proof of four elements: (1) a tying arrangement between two distinct products or services, (2) sufficient market power in the tying market to restrain free competition in the tied product market, (3) a substantial effect on interstate commerce, (4) the tying company has an economic interest in the sales of the tied product. *Carl Sandburg Village Ass'n No. 1 v. First Condominium Development Co.*, 758 F.2d 203, 207. (7th Cir.1985). Plaintiff argues that each of the elements has been established as a matter of law. Defendants contend that plaintiff has failed as a matter of law to adequately establish the third or fourth elements and that factual disputes preclude summary judgment on the other elements. Additionally, defendants seek summary judgment based on a statute of limitations defense and the absence of antitrust injury.

Appendix B

Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), Fed.R.Civ.P. A fact is material only if it might affect the outcome of the suit under the governing law. Disputes over unnecessary or irrelevant facts will not preclude summary judgment. A factual issue is genuine only if the evidence is such that a reasonable factfinder, applying the appropriate evidentiary standard of proof, could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Under *Rule 56(e)* it is the obligation of the nonmoving party to set forth specific facts showing that there is a genuine issue for trial.

Viewing the facts and drawing inferences most favorable to plaintiff, there is insufficient evidence for a fact finder to find that a tie between the defendant's multiple listing service and Realtor membership has had an effect on interstate commerce as that element has been defined by the Supreme Court. A tying arrangement is a violation of antitrust law only if a substantial volume of commerce is foreclosed by the tie. *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 16, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984). "Similarly, when a purchaser is "forced" to buy a product he would have otherwise bought even from another in the tied-product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed." *Id.*

Two courts of appeal have considered this requirement in the context of a tie between MLS access and Realtor association membership. In *Wells Real Estate, Inc. v. Greater Lowell Board of Realtors*, 850 F.2d 803, 815 (1st Cir.1988) the Court upheld a directed verdict dismissing the claim, reasoning as follows:

> However, Wells' action is indeed fatally affected by the excerpt from *Hyde* quoted above. Wells has failed to demonstrate the slightest market for membership in real estate boards that might have been affected by the defendants' alleged tying arrangement. There is no evidence that any other broker would have "purchased" membership in any other board but for the power exerted by the lure of the defendants' MLS. There is no evidence that a substantial volume of "commerce" in board membership was foreclosed by the tie-in.

In contrast, the Eleventh Circuit found a substantial effect on commerce resulting from an MLS-Realtor board tie. *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566 (11th Cir.1991). One of the plaintiffs in *Thompson*, Empire Real Estate Board, provided services similar to the defendant real estate board. Empire was established in 1939 to serve African American real estate professionals at a time when the local Realtor association excluded them. Both boards continue to exist and to provide a similar range of services to members. Evidence established that 400 members of Metropolitan would have been members of Empire but for the MLS-Realtor board tie. The Court found a substantial foreclosure of competition based on the facts.

Appendix B

The issue before this Court is whether plaintiff has brought forth sufficient evidence from which a fact finder could conclude that competition in the south central Wisconsin real estate services market has been foreclosed by the SCWMLS tie to defendant Realtors. In an effort to meet its burden plaintiff has presented survey evidence from Wisconsin and statistical analysis from other markets, that supports the finding fewer real estate professionals would join defendant Realtors in the absence of the tie. This evidence suggests that about 20% of Realtor members would not join if they could obtain MLS services without membership. The law is clear, however, that merely establishing that customers purchased an unwanted product does not establish foreclosure of competition. *Jefferson Parish*, 466 U.S. at 16. "When there are no rival sellers of the tied product, then the alleged tie-in might affect a substantial volume of commerce in the tied product and yet not foreclose anyone." 9 Phillip A. Areeda, et. al., *Antitrust Law*, ¶ 1723 (2d ed.2004).

In an effort to demonstrate foreclosure plaintiff has produced a laundry list of entities that he asserts are competitors in the market for the services provided by defendant Realtors. However, examination of the undisputed facts about these entities and the related expert report does not suggest that they are in the same product market with defendant Realtors. While it is true that there is superficial overlap in the offerings of these associations-conventions, websites, education, publications, lobbying-these similarities do little to establish that any are competing in the same product market with Realtors. Virtually all professional organizations offer such services while undoubtedly serving different product markets.

Appendix B

Services are in the same market when they are good substitutes for one another. That is, when there is "interchangeability of use or the cross elasticity of demand between the product and the substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962). Furthermore, plaintiff bears the burden to prove by econometric evidence that the products are good substitutes. *Menasha Corp. v. News America Marketing In-Store, Inc.*, 354 F.3d 661, 664 (7th Cir.2004). "[O]bserving things that to the untutored eye seem to be substitutes need not mean they *are* good substitutes." *Id.* Not only has plaintiff failed to bring forth econometric evidence, its proffered competitive associations do not appear to be good substitutes even to the "untutored eye."

Three of the associations, NAEBA, CEBAA and MABA, serve only exclusive buyer agents. The latter two serve agents in Colorado and Massachusetts and are therefore unlikely to be substitutes for services provided in Wisconsin even if the services offered were similar. Plaintiff, who is a member of NAEBA, has testified that the Realtors and NAEBA offer distinctly different services because NAEBA is directed specifically to the concerns of buyer agents. He testified that he joined NAEBA without regard to his membership in Realtors and that he knew of only one other real estate professional in Wisconsin eligible to join NAEBA.

Three other associations, AI, NAIFA and NAREA are devoted to providing services to real estate appraisers. An unlikely substitute for the far more general services offered to real estate professionals by Realtors.

Appendix B

Four additional associations which plaintiff suggests as substitutes, AREAA, CREAA, CAREPA and NAHREP, serve distinct ethnic communities and have as their purpose the advancement of those communities and real estate professionals within them. It seems unlikely that their services would be substitutes for Realtors. This inference is further supported by the fact that one of the organizations, CAREPA, is affiliated with the California Association of Realtors and NAR thereby dispelling any suggestion that they are competitors. Similarly, NAIREB is devoted to the needs of independent brokers apparently providing services unique to their needs while encouraging membership in Realtor associations.

Not only do none of these associations appear to be good substitutes, plaintiff has not offered evidence of a single real estate professional who has joined one of these organizations instead of Realtors or who has declined to join because he or she is a member of Realtors. The lack of such evidence is in stark contrast to the evidence in *Thompson* that 400 brokers fell into those categories. Furthermore, the dramatic differences in membership costs between the organizations and Realtors belies the suggestion that they are substitutes in the same product market.

On June 30, 2005 plaintiff offered a supplemental expert testimony of Riddle in the form of an analysis of non-random markets throughout the United states which purports to demonstrate that some of the alleged substitutes have higher membership rates in areas where there is no MLS tie ("open MLS") than in areas where there is such a tie ("closed MLS"). Defendants have objected to this evidence as untimely and inadmissible under Rule 702.

Appendix B

The supplemental report is untimely. The existence of competing real estate service providers in the relevant product market whose sales were foreclosed is an essential element of plaintiff's claim. Yet the initial expert report, filed within the time requirement of Rule 26(a)(2)(C), included nothing that would support this element. In fact, when he was deposed after issuing the report Riddle denied any opinion concerning whether other providers were in the same product market as Realtors. Riddle deposition of June 23, 2005 at 26-27. In light of the prevailing law it was apparent that this element would be critical to proving the claim. It is inappropriate to introduce expert testimony on this element under the guise of "rebuttal" simply because defendants subsequently denied the existence of the element. Under such circumstances exclusion is mandated by Rule 37(c)(1) unless the delay was harmless, an argument not made by plaintiff and unlikely to be sustained based on the prior deposition responses indicating that the expert would have no opinion on the topic.

Even if the belatedly disclosed expert testimony was admitted there appears to be little relevant, probative value in the analysis. It is likely that markets for professional real estate services are different in California, Georgia, Alaska and Massachusetts and Wisconsin. For example, the proffered competing organizations are directed at specific ethnic communities yet there is no apparent effort to control for the significant differences in populations between markets. Comparison of the data indicates great disparities in membership rates within the open and closed markets which suggest that other factors, far more than open or closed status, impact membership rates.

Appendix B

Whatever minimal value the survey might have it is certainly not evidence that the organizations included in the survey are in the same product market as Realtors. Riddle, who conducted the analysis and offered the evidence, expressly testified at his deposition that the comparison of membership rates between open MLS and closed MLS markets does not demonstrate that the associations are in the same product market as defendant Realtors and that he has not done any analysis that would support such a conclusion. Riddle deposition of June 23, at 31. He further testified that demonstrating that the associations competed in the same product market would require an analysis of comparative prices and price movements and an analysis of specific services offered by the compared providers. *Id.* at 30. No such analysis has been proffered even in the belated supplemental report.

Viewing the facts most favorable to plaintiff, he has failed to offer evidence sufficient to sustain a finding that there are competing providers of services in the tied product market whose sales have been foreclosed by the tie between MLS and Realtors. Accordingly, summary judgment must be granted in favor of defendants. The Court does not address the merits of the additional independent bases for judgment offered by defendants.

Plaintiff offers far less evidence or argument in support of his group boycott claim. To sustain such a claim plaintiff must demonstrate that the anti-competitive effects of the membership requirement outweigh any anti-competitive effects of the membership rule. Initially, plaintiff must demonstrate that the membership requirement has an adverse

impact on competition in the relevant market. *Bi-Rite Oil Co., Inc. v. Indiana Farm Bureau Co-op. Ass'n, Inc.*, 908 F.2d 200, 203 (7th Cir.1990). Plaintiff has not demonstrated that he or any other real estate professional was denied access to the MLS. His evidence in support of anti-competitive effect consists of referencing arguments made in support of the tying claim which have previously been rejected as establishing an anti-competitive effect.

In opposition to summary judgment plaintiff merely argues that defendants have failed to meet their burden to prove the absence of anti-competitive effects. This argument misapprehends the summary judgment process which permits a defendant to put the plaintiff to its proof merely by asserting the absence of evidence to support a particular element of plaintiff's claim. *Outlaw v. Newkirk*, 259 F.3d 833, 837 (7th Cir.2001). For the reasons set forth in the analysis of the tying claim, plaintiff has failed to provide evidence sufficient to sustain a finding of anti-competitive effect from the membership requirement. Accordingly, there is no need to proceed to a balancing of pro-competitive effects of the rule. Defendants are entitled to summary judgment on the group boycott claim.

Appendix B

ORDER

IT IS ORDERED that plaintiff's motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment is entered against plaintiff in favor of defendants dismissing plaintiff's complaint with prejudice and costs.

Entered this 25th day of August, 2005.

BY THE COURT:

s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED JULY 12, 2006

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 12, 2006

Before

Hon. Joel M. Flaum, *Chief Judge*

Hon. Michael S. Kanne, *Circuit Judge*

Hon. Diane P. Wood, *Circuit Judge*

No. 05-3601

JAY REIFERT,

Plaintiff-Appellant,

v.

SOUTH CENTRAL WISCONSIN MLS CORPORATION, REALTORS ASSOCIATION OF SOUTH CENTRAL WISCONSIN, INC., ROBERT L. COURTER, SUSAN MATTHEWS, DAVID START, ROBERT WEBER, THOMAS BUNBURY, MAURICE W. HILL, PETER SVEUM, MARSHALL ZWYGART and DAVID MCGRATH,

Defendants-Appellees.

Appendix C

ORDER

On consideration of the petition for rehearing filed in the above case on June 26, 2006, by the plaintiff-appellant, all of the judges on the original panel have voted to deny this petition. The petition is therefore DENIED.